

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In The Matter of)
)
Implementation of Section 309(j)) MM Docket No. 97-234
of the Communications Act)
-- Competitive Bidding for Commercial)
Broadcast and Instructional Television)
Fixed Service Licenses)
)
Reexamination of the Policy) GC Docket No. 92-52
Statement on Comparative)
Broadcast Hearings)
)
Proposals to Reform the Commission's) GEN Docket No. 90-264
Comparative Hearing Process to)
Expedite the Resolution of Cases)

To: The Commission

**JOINT COMMENTS OF DAKOTA COMMUNICATIONS,
LIVINGSTON COUNTY BROADCASTERS, INC., MEDIA ONE GROUP-ERIE,
LTD., POINT BROADCASTING COMPANY, DAVID AND LYNN MAGNUM,
SUN VALLEY RADIO COMPANY, INC., AND
WESTERN COMMUNICATIONS, INC.**

Dakota Communications, Livingston County Broadcasters, Inc., Media One Group-Erie, Ltd., Point Broadcasting Company, David and Lynn Magnum, Sun Valley Radio Company, Inc., and Western Communications, Inc. (collectively "Applicants"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit their comments concerning the

implementation of the Balanced Budget Act of 1997^{1/} with respect to the initiation of auctions to resolve mutually exclusive applications for broadcast services pursuant to the Commission's Notice of Proposed Rule Making ("NPRM").^{2/}

I. INTRODUCTION

1. The Applicants appreciate the opportunity to provide their views to the Commission on the implementation of the Balanced Budget Act of 1997 with respect to the initiation of auctions to resolve mutually exclusive applications for broadcast services. As the Commission recognized in its NPRM, there are a number of pending mutually exclusive applications filed after June 30, 1997 in the AM and FM services.^{3/} The filing window for these services has closed, and the Commission has requested comments on whether these filing windows should be reopened to permit new applicants to compete for these services.^{4/} The Applicants are of the opinion that the Commission should remain consistent with its previously announced policies and should not reopen filing windows that have closed.

2. The Applicants have a stake in this proceeding since all have filed applications for new service after June 30, 1997, during filing windows announced by the Commission that have since closed. Dakota Communications filed an application for FM service in Wessington Springs, South Dakota on December 26, 1997. Livingston

^{1/} Pub. L. No. 105-33, 11 Stat 251 (1997).

^{2/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Notice of Proposed Rule Making, ("NPRM"), MM Docket No. 97-182, GC Docket No. 92-52, GEN Docket No. 90-264, FCC 97-397 (November 26, 1997).

^{3/} NPRM at ¶ 39.

^{4/} NPRM at ¶ 42.

County Broadcasters, Inc. filed an application for FM service in Lexington, Illinois on September 11, 1997. David and Lynn Magnum filed an application for FM service in Mt. Horeb, Wisconsin on October 30, 1997. Media One Group-Erie, Ltd. filed an application for FM service in Ashtabula, Ohio on July 24, 1997. Point Broadcasting Company filed an application for FM service in Grass Valley, California on August 14, 1997, in Truckee, California on October 3, 1997, and in Lenwood and Baker, California on November 7, 1997. Sun Valley Radio, Inc. filed an application for service in Weston, Idaho on September 4, 1997. Western Communications, Inc. filed an application for service in Pocatello and Idaho Falls, Idaho on August 7, 1997. Each of the applicants will be directly affected by the Commission's ruling in this matter, thus the Applicants have the requisite standing to participate in this proceeding.

3. The Applicants have diligently followed established Commission procedures and filed applications within the appropriate filing windows. For the reasons indicated herein, the Commission should not overturn previously announced Commission policy, but should retain the established filing windows.

II. BACKGROUND AND SUMMARY

4. The traditional procedure for deciding among mutually exclusive applications for new broadcast services was the comparative hearing. Following the decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), which cast doubt on the "integration preference" used by the Commission in its comparative hearings, the Commission stayed all ongoing comparative cases while it sought to revise its comparative selection criteria.⁵⁷ In 1997, Congress required the Commission to use competitive bidding procedures to resolve most mutually exclusive applications for new broadcast services as part of the Balanced Budget Act of 1997.

⁵⁷ *Public Notice: FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

5. In order to determine whether mutually exclusive applications exist, the Commission has traditionally announced beginning and ending deadlines, or “filing windows,” for filing applications in available services. If no competing applications were filed during the window, the legal and technical qualifications of the applicant were examined, and if found acceptable, the construction permit was granted. If there were conflicting or “mutually exclusive” applications filed on or before the cutoff date, the applications were resolved by the comparative hearing process. Services still available after the closing of a filing window were available on a “first come / first serve” basis.

6. In the NPRM, the Commission seeks comments on the implementation of the congressionally mandated competitive bidding procedures for mutually exclusive applications for new broadcast services. The Commission has proposed to implement a window filing system for FM service that is functionally identical to the longstanding procedure. In the Commission’s proposal, “[i]f there is an unused FM allotment, an applicant may file for that unused channel allotment within the window filing period specified by the Commission.”⁶ Thus, while the selection procedure will change from a comparative hearing to an auction, the finality of the application deadline will be imposed under the new system will remain as it is under the current system: “we propose to establish a specific time period or auction window during which all applicants seeking to participate in an auction *must* file their applications.”⁷(emphasis added)

7. While there are many novel issues to be addressed by the Commission in this proceeding, the finality of previously announced filing deadlines should not be open to question. The Commission has not proposed any changes in the general requirement that applicants seeking an available allotment must apply during an announced filing window. In the allotments for which filing windows have already been closed, any interested parties have had ample opportunity to file applications. Congress has directed the Commission to base its policy on the objective of speeding the deployment of new

⁶ NPRM at ¶ 60.

⁷ NPRM at ¶ 61.

services to the public.^{8/} The only reason for a Commission decision to reopen such a filing window would be in the expectation of generating higher revenues, an end expressly rejected by Congress.^{9/} The most effective means for implementing congressional objectives is to rapidly bring new broadcast service to the public by retaining the closed filing windows.

III. THE COMMISSION SHOULD NOT RE-OPEN FILING WINDOWS THAT HAVE CLOSED

8. The procedure traditionally used by the Commission to determine the existence of competing mutually exclusive applications is identical to the system proposed in the NPRM. The procedure has worked well over a long period of time, and the broadcast industry has come to rely on it. Since the Balanced Budget Act does not direct the Commission to upset its established policies regarding the use of filing windows, the Commission has wisely determined that strictly adhering to firm deadlines is the most fair and efficient means for determining the pool of applicants for a competitive bidding scheme. The Commission should not punish those applicants who were diligent in filing their applications and reward those who were not by reopening closed filing windows. Further, a decision to reopen filing windows is in conflict with the congressionally stated objective of rapidly bringing new services to the public, and would also be in conflict with Congress' direct instruction that expectation of revenue

^{8/} 47 U.S.C. § 309(j)(3) (The first listed objective in that Section is "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.")

^{9/} 47 U.S.C. § 309(j)(7)(A) ("[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.")

generation should not be the basis of Commission policy¹⁰. Finally, in such a scheme, the Commission would benefit from maintaining the respect of the industry for the finality of Commission deadlines by retaining previously closed windows.

9. In rendering its decision, the Commission should consider the equities of the parties that will be impacted by the result. The Applicants in this petition were alert in following Commission announcements pertaining to announced filing windows. They were diligent in preparing their applications and filing them on time. They have expended time, effort, and expense in researching the feasibility of offering new broadcast services and filing their applications for construction permits. The Commission should reward the diligent efforts of these applicants who played by the rules. A reopening of the filing windows, on the other hand, would disadvantage these diligent applicants, and reward applicants who were negligent in filing according to the prescribed deadlines. The Commission's long-standing policies are well known in the broadcast industry, and any applicants serious about offering broadcast services to the public could have filed within the prescribed windows.

10. Congress recognized the importance of not overturning the expectations of applicants who diligently file applications according to established procedures in the Balanced Budget Act of 1997. In addressing those applications filed with the Commission before July 1, 1997, Congress directed that the Commission should "treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding."¹¹ While this provision only requires the Commission to retain the closed window for those applications filed before July 1, 1997, it shows Congress' preference for rewarding the diligence of applicants who filed in reliance on procedures announced by the Commission. Likewise, applicants who filed on or after July 1, 1997 within windows that have since closed should have the benefit of Congress' intention that those who rely on Commission procedures will not be subject to sudden

¹⁰ *Id.*

¹¹ 47 U.S.C. § 309(i)(2).

changes in those procedures.

11. The courts have stated that a settled rule carries a presumption that the intent of Congress will be best facilitated if the agency continues to follow that settled rule.^{12/} The Commission is obligated to make rational decisions, and the courts have determined that, in the context of Commission decisions, a sudden change in Commission policy is “rational” only when circumstances have changed.^{13/} An agency must continue to follow established policies absent a reasoned analysis for the change,^{14/} especially when the change would have a retroactive effect on some parties.^{15/}

12. A reopening of filing windows that have closed constitutes a change of Commission policy. This change in policy will have a retroactive effect, since applicants have relied on the assumption that only those applicants who filed during the filing window are eligible to participate in the auction. To reopen the window would upset the settled expectations of the parties and expose them to increased expenses. Such a change in Commission policy can only be made if changed circumstances warrant the reversal. While the congressionally mandated auctions do warrant a change in Commission policy with respect to the manner in which competing applications are resolved, the

^{12/} “[A] settled course of behavior embodies the agency’s informed judgement that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973).

^{13/} “[A] rational person acts consistently, and therefore changes course only if something has changed.” *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1053 (7th Cir. 1992).

^{14/} “Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983).

^{15/} “[T]he Board succeeded in developing a clear policy that seems applicable in this case; and to discard the policy without explanation would be arbitrary, especially when done with retroactive effect.” *Continental Web Press v. N.L.R.B.*, 742 F.2d 1087, 1093 (1984).

circumstances do not support a change in the deadlines for filing applications since the Commission plans to use the same window scheme under the auction system.

13. The Commission must make policies implementing the new congressional scheme in observance of the objectives announced by Congress in the Balanced Budget Act. Section 309(j)(3) of the Act lists Congress' objectives for the design of a competitive bidding system. The first listed objective in that Section is "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."¹⁶ The Commission is required to consider the objective of rapid deployment of new services in adopting these rules, since an agency decision is arbitrary and capricious if it fails to consider Congress' intention on the matter.¹⁷

14. The most effective means to accomplish the objective of rapid deployment of new services would be by retaining the closed filing windows. Clearly, opening the filing windows for new applicants would impose additional administrative delays. The Commission already has enough applicants in these new services to proceed immediately with auctions. Most of the applications at issue are for new services to be offered in rural areas. A reopening of these closed filing windows would be in direct conflict with the statutory objective of speeding the implementation of these new services to rural areas. Given the primacy of this objective in the congressional scheme, the Commission must retain existing filing windows in order to speed the provision of service to the public.

15. Given that all interested parties have had ample time to file applications for the services available in these closed filing windows, the only conceivable reason for overturning Commission-established deadlines must be to generate higher revenues in the auction process. Congress expressly stated that this is not to be a permissible basis for establishing auction policies. According to the Communications Act of 1934, as

¹⁶ 47 U.S.C. § 309(j)(3).

¹⁷ *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 44 (1983).

amended, Section 309(j)(7)(A), “the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.”

16. A decision to reopen a filing window could not be justified by any other reason than the expectation that including additional applicants could drive up auction bids. Commission policy must not be determined by a rationale expressly forbidden by Congress. The courts have held that an agency rule would be arbitrary and capricious if it relied on factors that Congress did not intend it to consider.^{18/} Therefore, the Commission may not consider the financial impact of additional bidders on its decision to reopen the filing window.

17. Finally, since the Commission intends to establish filing windows in the future and expects the industry to observe those deadlines, the Commission has an interest in preserving the industry’s respect for the finality of filing deadlines. Preserving established filing deadlines would encourage a sense of predictability and fairness in the industry, and would encourage applicants to file their applications on time. If the Commission demonstrates a willingness to vacillate on filing deadlines, it will encourage applicants to ignore filing deadlines and swamp the Commission with petitions for rule changes, causing administrative delays.

^{18/}

Motor Vehicle Mfrs. Ass’n v. State Farm, 463 U.S. 29, 44 (1983).

IV. CONCLUSION

Based on the foregoing, the Applicants respectfully urge the Commission to retain the closed filing windows as described herein.

Respectfully submitted,

Dakota Communications
Livingston County Broadcasters, Inc.
Media One Group-Erie, Ltd.
Point Broadcasting Company
David and Lynn Magnum
Sun Valley Radio Company, Inc.
Western Communications, Inc.

By:



David D. Oxenford

David K. McGraw

Fisher Wayland Cooper Leader
& Zaragoza L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494
Dated: January 26, 1998